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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 819

FRANKLINVILLE REALTY COMPANY,
Petitioner,

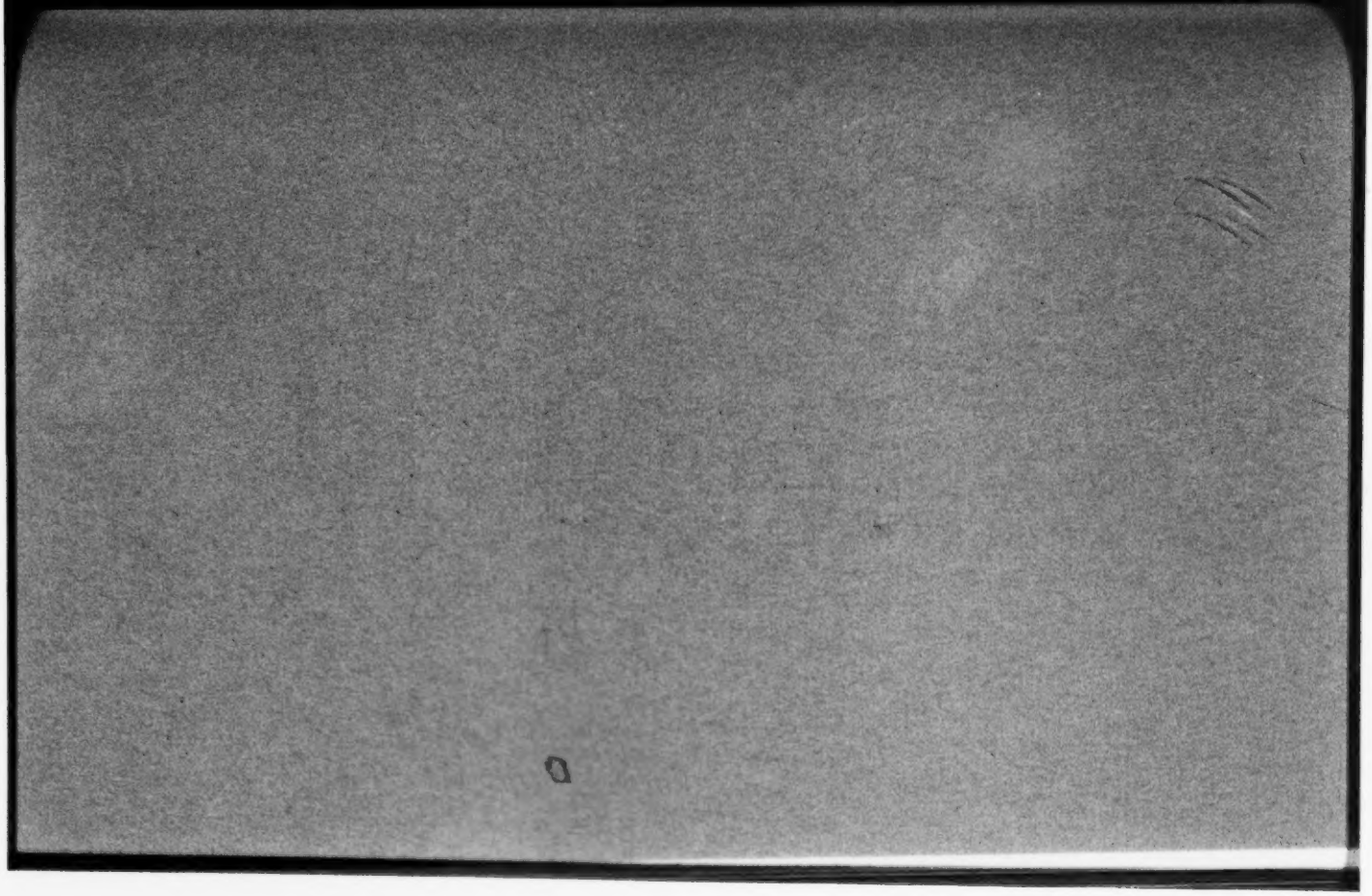
vs.

ARNOLD CONSTRUCTION COMPANY.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

T. J. BLACKWELL,
Counsel for Petitioner.



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Memorandum Concerning Opinion of Lower Court.

Since the petition for writ of certiorari was filed herein, the opinion of the Circuit Court of Appeals for the Fifth Circuit in this case, No. 10455, has been published. It is contained in the Federal Reporter, Second Series, Advance Sheets for March 8, 1943, 132 F. 2d 828.

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Preliminary Statement as to Alleged Errors in Petition.

The recitals contained in the petition for Writ of Certiorari herein have been re-examined, in view of the comments made in the Answer of the Respondent. We have found in the petition no inaccuracy or lack of exactness that seems to require explanation or amplification at this point.

The illusory nature of the purported errors in petitioner's statement and of the distinctions sought to be drawn in the answer will appear from the following:

Argument in Reply.

QUESTION ONE.

At the first trial, the Master, on defendant's motion, required the plaintiff to produce its records and cancelled

checks (R. 800-801). However, he almost immediately *reversed* that ruling. The Master stated that he would *"let the plaintiff stand on the architect's requisitions, in the absence of anything in the pleadings attacking these requisitions"* (R. 821).

Thereby, the defendant was deprived of a basis for an effective cross-examination of the plaintiff's witnesses and of the intervening plaintiffs, as witnesses, at the first trial. It is not correct to say that J. Y. Arnold was the only witness whose cross-examination was restricted.

At the second trial, the District Court did permit the defendant to recall (only) J. Y. Arnold for further cross-examination, and it was by such examination shown that he had directed charges against defendant, on plaintiff's books, of many thousands of dollars, for materials not known by him to have been used on the job.

If, at the second trial, defendant's motion to recall plaintiff's other witnesses had not been arbitrarily denied, cross-examination would have produced similar disclosures by them.

At the first trial the Master ruled that the architect's certificates were not subject to attack, and defendant was precluded from impeaching them. Clearly, the Master was wrong, for these reasons:

(1) This defendant's answer did set forth an affirmative defense of fraud (that has never been passed upon). It is therein averred (R. 123-124) that the charges represented by plaintiff's requisitions and architect's certificates thereon were *grossly excessive.* It is there further averred that the plaintiff is seeking to collect from defendant $25,-873.50, not due and owing.

(2) It is well settled that there need be no affirmative defense to attack architect's certificates which the contract does not make final or conclusive. Where the certificates

are not final or conclusive under the terms of the contract, they may be attacked under the defendant's general denial of the plaintiff's claim.

At the first trial, the issue as to fraud and collusion between the contractor and the architects was not tried and was not disposed of. The owner's evidence thereof was excluded.

If the Circuit Court of Appeals did dispose of the matter in the first appeal on the basis asserted by respondent in its brief herein, so that such question as to "collusion" and grossly excessive charges "was not open", then the said appellate court has denied petitioner due process in restricting the questions to be retried.

Question Two.

The record does disclose that the defendant was denied the privilege of proper cross-examination. It discloses that the District Judge believed that the question as to collusion "was not open" and ruled accordingly, throughout the second trial.

Question Three.

Fatio, intervening plaintiff, through the architect's certificates received in evidence, was a witness against defendant. As the certificates were not conclusive, he was subject to cross-examination concerning them.

The court did grant the defendant the right to examine Fatio, architect, as an unwilling or hostile witness, by propounding leading questions to him (R. 2d 545). The defendant then proceeded to so interrogate him and further objections were interposed. Those objections were sustained (R. 2d, 636-637), as is fully shown in the appendix to petitioner's main brief.

Question Four.

Seelman, architect, was an actual witness for the plaintiff at the first trial. He was also an adversary party in the case. After it was held, on the first appeal, that his certificates were not conclusive and the case remanded, he was subject to cross-examination by defendant as to the matter of collusion.

A wide latitude is permitted in seeking evidence of fraud, and it is especially true that extreme latitude should be permitted in the cross-examination of a party in regard to a fraud issue. *Volusia County Bank* v. *Bigelow,* 45 Fla. 638, 33 So. 704.

To permit a party to issue a certificate which is received in evidence against his adversary and then refuse to submit to cross-examination as to the subject-matter of the certificate, would seem to extend the idea of privilege to a point far beyond the remotest boundaries of that fair domain known as "due process of law".

Questions Five and Six.

It is not necessary to go beyond the report of the Auditor to ascertain that the architect's certificates were impeached and discredited.

Exhaustive studies of the unfinished structure had been made, to determine what the work done had amounted to, on a reasonable cost and fair value basis. The highest figure given by any witness in the case, as the maximum of such cost, was that of a highly qualified engineer, Phil J. Laurence. He testified, without cross-examination or contradiction, that the maximum was $34,256.00, and his figure was accepted by the Auditor in his report (R. 2d, 668).

The issuance of architect's certificates aggregating in amount $53,129.50 for work of a value, at the utmost, of $34,256.00, under the circumstances of this case, was most cogent evidence of fraud. There was much evidence of

fraud otherwise. All such evidence was *disregarded,* for the reason stated by the District Judge, and therein due process of law was denied petitioner, as defendant.

Questions Seven to Eleven

The building contract itself provided that defendant would reimburse the contractor for (only) costs necessarily incurred for the proper prosecution of the work, at rates not higher than the standard paid in the locality (R. 28). (See, also, averments of Bill of Complaint, R. 12.)

The contract also provided (Article 3) that the contractor must recognize the relation of trust and confidence established thereby between himself and the owner (R. 27).

Aside from the impeached and discredited architect's certificates, there was no evidence in support of plaintiff's claim except by way of unsupported ex parte book entries, and unauthenticated invoices. The charges, reflected by the book entries, were conclusively shown to have been authorized and made by parties not professing to have knowledge that labor and material charged for had been used, or was intended for, petitioner's house.

Question Twelve.

It has always been the law of Florida that a lien claimant, coming into a court of equity for foreclosure, must come with clean hands. The courts of Florida have also held, invariably, that when such a claimant presented an exorbitant and unconscionable demand, he should be denied relief. The mechanic's lien statutes of Florida have been so interpreted, especially in cases, such as the one at bar, involving a "cost plus" contract, where there is a fiduciary relationship between the contractor and the owner. But the Circuit Court of Appeals for the Fifth Circuit lost sight of the foregoing and applied the statute in a manner contrary to the Florida decisions.

Conclusion.

In conclusion, we respectfully submit that the record discloses fully and inescapably that at the first trial in the District Court, it was erroneously held that the architect's certificates were conclusive and not subject to impeachment for fraud or error; that the appellate court ordered reversal, holding that such certificates were not final and conclusive, but in no way disposed of the question as to fraud and collusion between the architects and the contractor; that at the second trial, the District Court declined to consider the evidence of fraud and collusion between the architects and the contractor, erroneously declaring that that issue had been disposed of on the first appeal; that on the second appeal, the appellate court flatly abdicated its function and declined to appropriately review the judgment below, thereby sanctioning and perpetuating the lower court's denial of due process. Further, petitioner was denied the right to appropriately cross-examine its opponent's witnesses and the adverse parties.

The extreme extent to which the lower courts have departed from the essential requirements of due process of law is accentuated by the answer of the respondent herein; not by way of what opposing counsel have said therein on behalf of respondent, but by reason of their total and unavoidable failure to explain or justify the actions of the lower courts, such actions being fundamentally and hopelessly at variance with constitutional principles.

Respectfully submitted,

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